Supreme Court, U. S.
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In The
Supreme Court Of The United States

OCTOBER TERM, 1978

NO. **78-1132**

WATERBURY PETROLEUM PRODUCTS, INC.
Petitioner

v.

JOHN B. HULL, INC., THE SANDMEYER OIL COMPANY, COMMUNITY PETROLEUM PRODUCTS, INC., AND DUTCHESS AUTO CO.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Petitioner, Waterbury Petroleum Products, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Unites States Court of Appeals for the Second Circuit entered in this proceeding on November 30, 1978.

OPINION BELOW

The opinion of the Court of Appeals affirming but modifying the judgment of the U. S. District Court for the District of Connecticut has not yet been reported (App. p.2). The district court "adopted, ratified and confirmed" the recommended ruling of the hearing magistrate, including the findings of fact and conclusions of law therein (App. p. 27).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered November 30, 1978 (App.p.13). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does the Federal District Court possess the necessary subject matter jurisdiction to hear this case where the claim is price discrimination in violation of 15 U.S.C. §13(A) but where analysis of the parties and market conditions shows that the jurisdictional prerequisite of injury to competition is missing?

2. Should a small retail oil company (Petitioner) that has no unequal advantage or unequal power base, the exercise of which might injure competition, be stopped from marketing fuel oil on a discount basis to consumers by competing oil dealers who service a far greater share of the relevant oil market than Petitioner's 2% share of this market?

(A) Is it time to overrule the presumption of injury to competition, established in the case of Samuel H. Moss, Inc. v. FTC, 148 F.2d 378, 379 (2d Cir.), cert. denied, 326 U.S. 734 (1945), which presumption exists in no other circuit other than the 2nd Circuit?

(B) Should the inference of predatory intent established in the case of Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 696-698, 762 (1967) be strictly limited to cases involving the exercise of an unequal economic power?

STATUTE INVOLVED

Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. §13(A) provides in pertinent part:

> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place other than the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such

discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . . ."

STATEMENT OF THE CASE

For three generations Waterbury Petroleum Products, Inc. ("WPP") engaged in the retail sale of heating oil in Waterbury, Connecticut. At all times relevant to this controversy, the four Respondents were engaged in this same oil business in an area referred to as the Northwest Corner, encompassing parts of northwest Connecticut, southwest Massachusetts and the adjacent area of New York. Prior to 1975, WPP did not engage in business in the Northwest Corner, but in 1975, WPP purchased the assets, not the stock, of a small oil business in Canaan, Connecticut. The four Respondents sell approximately 50% of the 20 million gallons of fuel oil sold annually in this market area while WPP sells only 2% of the oil sold in this area. All of the companies were classified as "mom-pop" type oil businesses by the trial judge.

Shortly after acquiring the Canaan business, WPP's Canaan employees left to go with a Northwest Corner competitor and a competitor took possession of WPP's Canaan terminal and bulk tanks. WPP began to lose many customers in this market area.

In September of 1976, WPP sought to reverse its declining fortunes in the Northwest Corner by discounting the price of heating oil 9 cents per gallon. WPP would reduce the price 4 cents per gallon by not servicing the oil burners of customers. In addition, WPP offered a prompt payment discount of 5 cents per gallon. WPP analogized this change to a new pricing policy to a full service gas station changing to a self-service gas station. The new pricing policy proved successful in recapturing old customers and acquiring new ones.

The Respondents, not pleased with the low price per gallon WPP charged for fuel oil in the Northwest Corner, brought this action alleging that WPP's pricing policy violated Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. §13(A). A Preliminary Injunction was issued by the District Court enjoining WPP from discounting from its base price for prompt payment and/or lack of provision for burner service. WPP appealed the issuance of the injunction, claiming that the Court lacked subject matter jurisdiction in that the jurisdictional prerequisite of injury to competition had not been and could not be shown and that the injunction was too broad.

The Court of Appeals for the Second Circuit affirmed but modified the District Court's decision. It rejected the reasoning of the Fifth Circuit in Hampton v. Graff Vending Co., 516 F.2d 100, 101-102 (5th Cir. 1975) and Cliff Food Stores Inc. v. Kroger, Inc., 417 F.2d 203, 208 (5th Cir. 1969). See also, Earl A. Kintner, A Robinson-Patman Primer, P. 35 (1970). In discussing injury to competition, the Court relied upon the often critized case of Samuel H. Moss, Inc. v. FTC, 148 F.2d 378, 379 (2d Cir.),

cert. denied, 326 U.S. 734 (1945), which is the law of only the Second Circuit, and the Court further relied upon the case of Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 696-698, 702 (1967) which is clearly distinguishable on the facts.

The result in this case was to force WPP to charge a higher price per gallon for fuel oil to its consumers and to expose other small businessmen to the same threat of an expensive lawsuit by larger businesses attempting to use the federal courts to fix prices. An analysis of the market conditions, the parties, and the legislative history of the statute show that the Court lacks subject matter jurisdiction in this case and that the matter should be dismissed for that reason.

REASONS FOR GRANTING THE WRIT

Novel and important questions of subject matter jurisdiction and federal statutory construction are presented in this case. This enforcement of the Robinson-Patman Act (15 U.S.C. 13 (A)) has resulted in a direct conflict between the Second Circuit and all of the remaining Circuit Courts of Appeals; in addition, a conflict in the reasoning between the Fifth Circuit Court of Appeals and the Second Circuit Court of Appeals in the area of subject matter jurisdiction has arisen. An answer to these questions will substantially assist the courts in achieving a uniformity of treatment of this federal statute. The importance of this case is dramatized by the fact that the case involves a small retail oil dealer attempting to discount the price of heating oil to his customers at a time when the price of oil is escalating. The lower court's decision undermines the purpose and meaning of this

statute in that it is now being used by a group of oil dealers to force the courts to effectively fix prices and to hurt the small businessman. A Supreme Court decision favorable to the Petitioner will void all previous proceedings and future Robinson-Patman Act proceedings in this matter will be unnecessary. A decision by the Supreme Court, even if unfavorable to the Petitioner, will assist the Court in the trial of this matter as the issues set forth in this Petition necessitate decisions that are fundamental and necessary to the further conduct of this case. An immediate favorable decision will enable small businessmen in the county to lower prices for their products without fearing expensive litigation.

1. THE NEED FOR UNIFORMITY OF JUDGMENTS MANDATES THE ISSUANCE OF CERTIORARI.

A. The Decision Below involves the reliance by the Court of Appeals on the "Moss Rule" whereby the Respondents' burden of showing anti-competitive effect is satisfied upon the mere showing of difference in price. This rule is not followed in any other Circuit.

Price discrimination for purposes of the Robinson-Patman Act is "merely a price difference." FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 549 (1960). As the Court of Appeals states on page 449 of its opinion, "In this circuit, proof of price discrimination satisfies a plaintiff's initial burden of showing injury to competition and shifts the burden of proving that its acts did not substantially lessen competition. Samuel H. Moss, Inc. v. FTC, 148 F.2d 378, 379 (2d Cir.), cert. denied, 326 U.S. 734 (1945)."

The holding of the Moss case puts the Second Circuit in conflict with every other Circuit Court of Appeals. "The Second Circuit Court of Appeals, however, in Moss and subsequent cases mistakenly indicates that the burden shifts under Section 2(b) merely upon proof of a price discrimination." (Emphasis supplied.) H. Shniderman, Price Discrimination In Perspective, p. 26 (1977). The Petition should be granted to eliminate the present direct conflict among the Circuits and to secure a uniformity of judgments.

B. The Fifth Circuit has indicated that injury to competition is a jurisdictional prerequisite but the Court below elected not to follow this line of reasoning, creating a conflict with the legislative history of the Act and a probable conflict between the Circuits.

Review of the legislative history of this Act reveals that the purpose of this statute was to encourage small business to compete fully and to protect small business from the larger, more powerful competitors. "The final jurisdictional requirement under Section 2(a) of the Robinson-Patman Act -- the likelihood of competitive injury -- emphasizes that only those discriminations likely to have a substantial adverse effect upon competition are prohibited. This requirement reconciles the Act with Congressional anti-trust policy embodied in the Sherman Act and other anti-trust statutes." H.R. No. 94-1738, 94th Cong. 2d Sess., Conclusion No. 1, page 121 (1976).

Concerning this element of "injury to competition," in this case, the Court of Appeals stated clearly that the Fifth

Circuit "explicitly described [it] as a prerequisite to jurisdiction. Hampton v. Graff Vending Co., 516 F.2d 100, 101-102 (5th Cir. 1975)." However, the Court below chose not to follow this reasoning.

The confusion between the legislative history, the above cited Hampton case, other Fifth Circuit cases such as Cliff Stores, Inc. v. Kroger, Inc., 417 F.2d 203, 208 (5th Cir. 1969), and the ruling in the Court below should be eliminated and a uniformity of reasoning established between the Circuits on this important jurisdictional issue.

2. IN THE AREA OF INJURY TO COMPETITION, THE CASE OF UTAH PIE CO. V. CONTINENTAL BAKING CO., 386 U.S. 685, 696-698, 702 (1967) NEEDS TO BE LIMITED IN ITS HOLDING AND IS CLEARLY DISTINGUISHED FROM THE INSTANT CASE ON THE FACTS.

In the Utah Pie case the defendants were three national baking concerns with huge economic power, huge marketing divisions and huge capital. The use of the inference of predatory intent from proof of sales below cost should be limited to cases where such inequality in economic power exists. It should not bind the small businessman who has little or no economic power while acting on his own.

3. THE ROBINSON-PATMAN ACT SHOULD NOT BE USED TO FORCE HIGHER PRICES UPON SMALL BUSINESSMEN AND TO FIX HIGHER PRICES OF FUEL OIL AT A TIME WHEN INEXPENSIVE FUEL OIL IS NECESSARY.

A. The legislative history of this statute demands that this case be dismissed for lack of subject matter jurisdiction. The guiding principle in the area of

judicial intervention in private business pricing is that "§2(a) must be used in conformity with the public policy of preserving competition, but it is not concerned with mere shifts of business between competitors. It is concerned with the substantial impairment of the vigor or the health for the contest of business, regardless of which competitor wins or loses." Anheuser-Busch, Inc. v. FTC, 289 F.2d 835, 840 (7th Cir. 1961). (Emphasis added.)

Frederick Rowe cites that the Senate Judiciary Committee's "guiding ideal" as it considered this legislation was the preservation of equal opportunity and the preservation of the public's freedom from monopoly. Frederick Rowe, Price Discrimination Under the Robinson-Patman Act, p. 20 (1962).

A thorough study of this legislative history, the purpose and language of the Act requires the dismissal of this case for lack of subject matter jurisdiction.

B. This is a case of first impression. If the Court of Appeals' decision is not overruled, actions filed by competitors seeking to fix higher prices will not be subject to a Motion to Dismiss for lack of subject matter jurisdiction and the Petitioner will be forced either to settle the case by raising his prices or to spend large sums of money to litigate the matter. The decision below is therefore harmful to all consumers and all small businessmen.

The high price of heating oil is creating a crisis in the Northeast region of this country and yet the Court of Appeals' decision requires the Petitioner

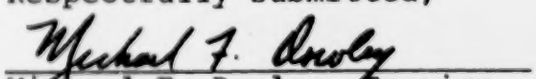
to increase its Northwest Corner price by many cents per gallon.

A decision on this issue should be made as soon as possible for the benefit of consumers of fuel oil in the region. Such a decision would give an impetus to fuel oil dealers to offer new alternatives to their customers in terms of different discount pricing alternatives. This crisis in the price of fuel oil and the pressure of inflation demand an immediate hearing. If Petitioner is successful, the lawsuit will be dismissed. Even if Petitioner is not successful, these questions must still be answered to assure fundamental and necessary fairness in the further court proceedings.

CONCLUSION

Because the rights of all small businessmen depend on this Court's immediate review and because the decision below deprives consumers of a lower price for heating oil, which they would immediately receive should this action be dismissed, and in order to achieve a uniformity of decisions among the Circuits, the Petitioner prays that an immediate Writ of Certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully Submitted,



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